No. 166.

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for Appts.

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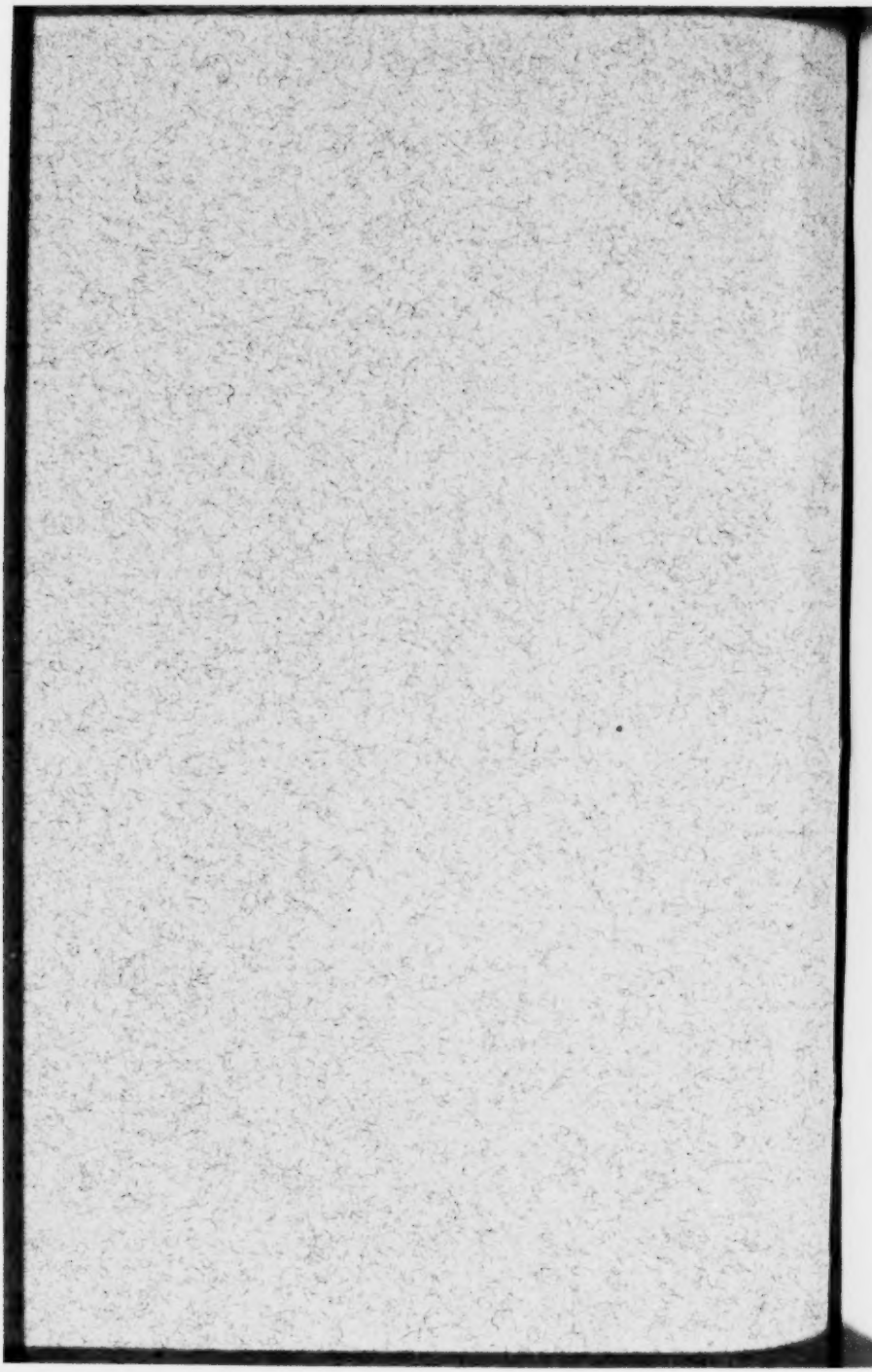
In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANTS,
v.
DIXON N. GARLINGER, APPELLEE. } No. 166.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLANTS.



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STATEMENT.

The appellee was appointed a night inspector in the customs service of the United States at the port of Baltimore, Md., on April 1, 1882, and continued to fill said office until August 25, 1886, a period of sixteen hundred and eight days, for which said period he was paid the statutory compensation of $3 per day (Rev. Stat., sec. 2733), which said payment was made up as follows: Thirteen hundred and fifty-three payments were for night service when he was present rendering actual service,

and 255 were for night service when he was absent and off duty—making a total of 1,608 nights, covering the entire period of his employment. (See Findings I and II, Rec., p. 5.)

Notwithstanding the fact that he has been paid all his statutory compensation, he now demands that he shall be paid over again for one-half of the time, because of a certain Treasury Department regulation (see Finding III, Rec., p. 6) providing for the division of the work into two watches, and further providing that if the employee be required to serve all night upon a given night he would be excused from service on the following night—his contention being that these "off nights" were his property, and that if they were used by the Government they must be paid for as extra or additional service; also contending that he was required to work more hours than were sufficient to constitute a "day." In these contentions the court below concurred, rendering judgment for the amount claimed, minus the amount barred by the statute of limitations, and minus the pay received for the 255 nights when he rendered no actual service, but was paid therefor as though he had been on duty. (See Rec., pp. 10 and 11.) From the judgment thus rendered against them the appellants have appealed to this court.

The questions presented in this appeal are of the utmost importance to the United States, for the reason that there are now pending in the Court of Claims and before the Treasury Department a great many cases involving the same questions as are here presented and

which will necessarily be controlled by the decision in this case. The amount involved in the cases now pending in the Treasury Department similar to the one at bar is something more than $100,000.

SPECIFICATION OF ERRORS.

The court below erred:

I. In holding that the provisions of the Treasury Department regulations, as set forth in Finding VIII (Rec., p. 6), constituted either a contract of employment between the appellants and the appellee, or that said regulations were made in pursuance of law and had the force and effect of law, and in placing such a construction thereon as to lead to a judgment in favor of the appellee and against the appellants in any sum whatsoever.

II. In holding that said regulations of the Treasury Department of 1874 continued in force or effect subsequent to March 24, 1883, or in rendering judgment against the appellants for any period in excess of 324 nights, or in any sum in excess of $972.

III. In refusing to grant the request of the appellants, as set forth in Finding X (Rec., p. 14), and in holding that said regulations of 1884 were not matters of evidence.

IV. In rendering judgment in favor of the appellee for any extra or additional service rendered subsequent to July 1, 1884, or for any period in excess of 417 nights, or for any sum in excess of $1,251.

V. In setting forth certain Treasury regulations in Findings VI, VII, VIII, and IX, and in holding them to be matters of evidence in this cause.

BRIEF.

I.

Section 2733 of the Revised Statutes, under the authority of which the appellee was employed, provides:

> Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary or expedient to employ, as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed.

The compensation provided for by this act has been paid to the appellee for his entire period of service. He claims, however, and the court below allowed him, half as much again, because he was required to serve all night instead of half a night—from sunset to sunrise instead of from sunset to midnight. This decision is based upon certain regulations made by the Treasury Department, and which are set out in Finding VIII (Rec., p. 6) as follows:

> ARTICLE 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches. Whenever it is necessary to assign a night watchman to a vessel or to any other all-night charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

The court below proceeded in its opinion upon two hypotheses: First. That the above-quoted regulation was to be regarded as the contract of employment between the appellee and the appellants; or, second, that the above-quoted regulation was to be regarded as being issued under authority of law for the regulation of the service of night inspectors, and that the same had the force of law and is in effect a statute. (See court's opinion, Rec., pp. 8 and 9.) It is true that the court, in its opinion overruling the defendants' motion for a new trial (Rec., p. 11), subsequently doubts the latter proposition and in effect overrules itself, the court saying: "Whether these regulations are authorized by law may well be doubted;" and toward the close of the opinion (Rec., p. 12) the court again refers to these regulations as "considered as taking the place of a contract." But inasmuch as this case is made to rest alternately first upon one hypothesis and then upon the other, it will be well to consider the cause in both aspects.

II.

THE TREASURY REGULATIONS OF 1874 DID NOT CONSTITUTE AN EXPRESS CONTRACT OF EMPLOYMENT BETWEEN THE APPELLANTS AND THE APPELLEE.

First, then, let us see whether this regulation can in any proper sense be regarded as a contract of employment between the appellee and the appellants. In the first place, it will be observed that this regulation was not in force at the port of Baltimore, where the appellee served, and that while these regulations were enforced

at other ports they had not been enforced at the port of Baltimore, at which said port the custom of dividing the night watches, and of giving a vacation or leave of absence on the night succeeding an all-night employment had not obtained; but, on the contrary, the surveyor of that port had always required the night inspectors to serve from sunset to sunrise. (See Finding VII, Rec., pp. 5 and 6.) The court finds that a copy of the pocket edition of the rules and regulations governing inspectors was handed to the claimant at the time of his employment, but there is nothing in this record to show that his attention was drawn to the regulation above quoted, or that any conversation was had between the appellee and the collector of the port on that subject, but on the contrary, since it is shown that said regulation was not enforced at that port, it is to be presumed that the appellee was cognizant of that fact, and was cognizant of the facts that the hours of duty and the period of the watches were such as the surveyor of the port might from time to time require, according to the exigencies of the situation. But suppose such a regulation had been brought to the attention of the appellee at the time of his employment. That would not have constituted a contract between him and the appellants. Conceding for the moment that the Secretary of the Treasury, in the face of the provisions of section 2733, Revised Statutes, and in face of the provisions of other laws of the United States to which we shall presently refer, possessed any power, right, or authority to regulate the number of hours which should constitute a day in amounts less than a calendar

day, it would certainly follow that if he had the right to regulate them at one time he would have the right to change them at another and at his will, without any knowledge or consent on the part of the appellee, as in fact was often done. Certainly, then, this could not be regarded as a contract, for it does not possess the necessary elements to make up a contract. A contract must be mutual, must be certain, must be binding upon both parties alike, and one party to it can not annul or change it without the other's consent; hence it would follow that if this regulation was a contract then the Secretary of the Treasury could not alter or modify the regulation without the consent of the appellee, and without the consent of all of the night inspectors in the United States. Certainly such a doctrine would fall little short of absurdity. It is well enough to argue by analogy, if one is careful to keep one's analogy correct, but the most misleading and fallacious of all arguments are to be found in those so-called arguments by analogy where the analogy does not properly exist. The court below begins it opinion (Rec., p. 8) by a very lucid and interesting exposition of the law of master and servant, illustrating from the common law the principles applicable to that doctrine, for the purpose of showing that the master, while he can require of a servant in unusual exigencies additional service, he can not require unreasonable service, and the court then applies these doctrines to the case at bar in the following language (Rec., p. 8):

> If we regard the case before us as one of master and servant, and the regulations of the Secretary of the Treasury as an express contract between the

parties, and the days specified in this contract as a single night watch running from sunset to midnight or from midnight to sunrise, it is manifest that the deviation of requiring the servant to serve from sunset to sunrise, of requiring one man to do the work of two men within the contemplation of the contract, is too gross a deviation to come within the exceptions allowed by the common law.

There is no analogy between the contractual relations of master and servant at common law and the statutory relations of employment between the United States and its servants. A statute, or for that matter a regulation of a Department, can never be in any appropriate sense called a contract, because it may be changed by Congress or by the head of the Department without the knowledge or consent of the employee; and while it is binding upon the employee so long as it continues in force, it is never binding upon the United States except so long as the Congress chooses to retain the law or the head of the Department to continue the regulation in force. It is idle, therefore, to build up any argument founded upon this false analogy. To do so is to beg the question at issue in this case.

III.

THE FACTS NEGATIVE ANY MOTION OF AN IMPLIED PROMISE TO PAY ANY ADDITIONAL SUM BEYOND THE STATUTORY RATE.

It is equally impossible to find in this regulation any analogy to an implied assumpsit or an implied contract. An implied contract is in no wise different from an express contract, except in so far as it relates to the method of proof, which belongs to the law of evidence.

In the one case the contract is made by the express written or spoken words of the parties, and in the other it is implied either from the words or the acts of the parties—implied, because the words or acts of the parties excluded any other hypothesis than that of a contract, real but not expressed. This doctrine is nowhere better expressed than by Mr. Justice Story in his work on contracts (Story on Contracts, 5th ed., sec. 11), where that learned jurist says:

> When the agreement is a matter of inference and deduction, it is called an implied contract. Both species of contract, however, are equally founded on the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, which belongs to the law of evidence. In an implied contract the law only supplies that which, although not stated, must be presumed to have been the agreement intended by the parties.

Tested by this principle, it will be readily seen that there is nothing in this transaction upon which to predicate an implied agreement. By reference to Finding V (Rec., p. 5), the court will observe that the court below found as a fact that the appellee protested to his superior officer, the surveyor of the port, against being required to perform the duty of an all-night watch without being excused from service on the next succeeding night. But the court did not find, and it is not a fact, that the surveyor of the port of Baltimore or any other officer of the United States concurred in this contention or claim of the appellee, or said or did anything upon which an implication of a promise or agreement to pay extra or additional compensation can be founded. On the con-

trary, the only logical deduction that can be made from the facts set out in Finding V is that although this protest was made by the appellee, his contention was repudiated and denied by the surveyor of the port. It certainly was not acquiesced in by that officer, and the facts do not show the semblance of an agreement for additional pay, either from the fact that the appellee was required to serve two watches, or that he was not at all times excused from the performance of duty the night following an all-night watch. There is, we submit, nothing in this transaction from which the court could imply a promise on the part of the appellants to pay the appellee for any additional service.

He who asserts an implied contract must prove a *contract.* Either there must be an express contract between the parties or else the thing furnished by the one party and accepted by the other must have been furnished and received under such circumstances as will show that the party furnishing it expected at the time to be paid, and that the party receiving it knew of this expectation, and, so knowing, received and accepted the benefit of the thing furnished. Then, if the party receiving does not promise to pay, the law will promise for him; that is, the law will imply a promise on his part. But the law will do this under no other circumstances. The mere fact that something was furnished by one party and received by another will not justify an implied promise to pay for it.

Holmes v. *Board of Trade,* 81 Mo., 137.
Day v. *Caton,* 119 Mass., 513.
Potter v. *Carpenter,* 76 N. Y., 157.
O'Connor v. *Hurley,* 147 Mass., 144, 148.

The learned court below appears to have overlooked these fundamental principles, and herein lies the error of applying the case of *Bachelder* v. *Bickford* (62 Me., 526) to the case at bar, for in that case there was a statute of the State which distinctly prescribed that, in the absence of contractual stipulations to the contrary, ten hours should constitute a day's work. Therefore the court held that when a miller, at the request of his employer and for his employer's benefit, worked during the solar day and also during the nighttime without any express contract or agreement, and without anything whatever having been said by one party or the other concerning the rate to be paid, the court would look at the law regulating the day of ten hours and from the facts of the case imply a contract on the part of the employer to pay the employee additional compensation for work in excess of the statutory day. But that is very far from being this case. If the miller in the case of *Bachelder* v. *Bickford* had protested to his employer that his contract of employment did not require him to work at night, and if that employer had repudiated such a construction of the contract of employment existing between them, contending that the contract of employment under which the miller served did require him to work at night as well as during the solar day, and the miller, although protesting, had acquiesced in this contention of his employer and worked during the night, certainly the court could not have implied any promise on the part of the employer to pay for a thing which he had expressly declared to the employee he would not pay for. There would have been no room for any such implication, and to have implied a promise to pay under

those circumstances would have been in plain violation of the agreement between the parties. It would not have been the interpretation of an existing contract, but the making of a new one. (See *Hawkins* v. *United States*, 96 U. S., 689, 696, 697, 698 and cases cited.) The analogy therefore fails, and the case can not be invoked in control of the case at bar, for here the appellee claimed one thing and the appellants another, and the appellee—whatever may have been his spoken words—acquiesced in the contention of the appellants and performed the duty which they required of him to perform, at the times and in the manner by them required. Where, then, is there any room for implying a promise to pay that which the appellants expressly said they would not pay? Even if the appellee had worked under the eight-hour law (15 Statutes, 77), the facts in this case would prevent the implication of a promise to pay for labor in excess of eight hours, for the appellee was informed that if he desired to retain his position he must work in the manner and for the time required of him by the surveyor of the port, and in this respect the case at bar is identical with that of *The United States* v. *Martin* (94 U. S., 440), wherein this court held that where a laborer who was in the habit of working for the Government twelve hours a day for $2.50 per day is informed by the proper authority that if he remains in the service at that compensation he must continue to work twelve hours a day, and he does so continue and is paid accordingly, he can not afterwards recover for the additional time over eight hours as a day's labor, notwithstanding the existence of the eight-hour law.

These doctrines are so admirably expressed in the case of *Grisell* v. *Noel* (9 Ind. App., 251, 258–261) that we may be pardoned for an extensive quotation from that opinion:

> It is the theory of appellant that, by virtue of the statute commonly known as the eight-hour law, he is entitled, without any special agreement, to receive extra pay for all the time he worked for the appellee over eight hours in any calendar day. Under the act approved March 6, 1889, eight hours is declared to constitute a legal day's work for all classes of mechanics, workmen, and laborers, excepting those engaged in domestic labor, but overwork for extra compensation, by agreement, is expressly permitted. Elliott's Supp., section 1606. * * *
>
> It was not intended by the statute in question to abridge the right of contracting for a greater number of hours than eight in any calendar day, and any attempt to do so must inevitably fail of the result desired, for the abundant reason that the reduction of the hours of labor would inevitably be followed by a corresponding reduction of the rate of compensation, and would in the end leave the parties in the condition they were before the law was enacted.
>
> The statute itself permits the parties to contract for extra time and compensation, and this, we apprehend, they would have *the right to do without the statute*. If parties may agree that for a day of eight hours the employee shall receive a stipulated sum, they also have the right to agree that for a day of more than eight hours he shall receive a definite sum.
>
> The parties to this action certainly had the right to stipulate that for a day of eight hours the appellant should receive $1, and for a day of eleven hours

$1.25, the 25 cents being the compensation for overwork. The fact that the subject of extra compensation was not mentioned would not in the least impair the validity of a contract for $1.25 for every day of eleven hours' work. If the parties could make an express contract of that tenor, the law will uphold an implied agreement to the same effect. The appellant must recover, if at all, either upon an express contract or on an implied one. If one person employs another to perform a single day's labor for him at $1.25, and at the end of that day the employer pays the laborer $1.25, and the latter accepts it in payment of the day's work, he can not afterwards recover an additional sum, albeit he may have worked nine or ten or eleven hours instead of eight hours, and notwithstanding the law under examination makes eight hours a legal day's work.

The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies when the work is done by the week or month or year. There can be no doubt that in the present case the appellee paid, and the appellant accepted, at the end of each week, the sum of $7.50 in full payment of the work done by him during the previous week.

The appellant testified, in effect, that he knew when he entered upon appellee's employment the nature and the amount of the work that was required of him, as well as the compensation he was to receive therefor. If, however, at the end of the first day or the first week he found that the number of hours he was to work per day was greater than he expected, or that the compensation he was to receive for a day's work was not for eight, but for ten or

eleven hours of such work, and he was not satisfied with such arrangement, he should have demanded more pay or insisted on a smaller number of hours of work per day, and he should have exacted an agreement to that effect from his employer. If the latter refused to accede to this, the appellant had his option to quit the employment or to continue at the same rates. By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation. This question was fully passed upon and decided by this court in the case of *Helphenstine* v. *Hartig*, 5 Ind. App., 172.

That decision is still in accord with our views of the law.

Under a New York statute, of which ours is almost an exact copy, the court of appeals reached the same conclusion in a case the facts of which were almost identical with those of the present one. It was there held that "The intent of the act was to place the control of the hours of labor within the discretion of the employee, giving him the privilege at his option to refuse to work beyond the eight hours, or to secure extra compensation for extra work by stipulation in the contract of employment. In the absence of any such stipulation the language of the act repels any inference of an intent to confer a right upon an employee to charge for more than one day's labor for services rendered in any calendar day; and for such services he may not demand any extra compensation." (*McCarthy* v. *Mayor, etc., City of N. Y.*, 96 N. Y., 1.)

To the same effect see *United States* v. *Martin*, 94 U. S., 400; *Schurr* v. *Savigny*, 85 Mich., 144, 48 N. W. Rep., 547; *Luske* v. *Hotchkiss*, 37 Conn., 219; *Brooks* v. *Cotton*, 48 N. H., 50.

IV.

EVEN IF A BREACH OF CONTRACT WERE SHOWN, NO RECOVERY COULD BE HAD BEYOND THE SUM ALREADY PAID.

Even if this regulation of 1874 could be regarded as an express contract of employment between the appellants and the appellee, and even if it should be considered that the appellants had violated the agreement, still we insist that the appellee has already been paid everything to which he is entitled. It will be observed that this regulation merely provides that "whenever it is necessary to assign a night watchman to a vessel or any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night;" in other words, the regulation provides for more rest and not for more pay. If it had been the intention to allow double pay under such circumstances, it would have been perfectly easy to have said so in unmistakable language. But there is no such provision, and the provision is only to the effect that the inspector shall be entitled to a holiday on the night succeeding an all-night watch. He was not given such holiday, it is true, but he has been paid in full for that day's service, and he can not recover double pay for that period.

In this respect the case at bar is identical with the case of *Schurr* v. *Savigny* (85 Mich., 144, 149, 151). In that case Schurr had a contract of employment with the defendant in error as an expert photographer and finisher

at and for the sum of $20 per week, the contract providing that the plaintiff in error should be entitled to a vacation of two weeks in each year. The contract did not provide for any special number of hours per day, and the plaintiff sued for extra and additional compensation upon the ground that the statutes of Michigan constituted ten hours a day's labor, and that work performed by the plaintiff in addition to that time should be paid for as extra work. The court disposed of the first contention by holding that the Michigan statute was not applicable to this class of employment, resting its decision upon the doctrine of master and servant, and holding that although under the ordinary doctrine of master and servant the servant is not compelled to work for more hours than could have been reasonably required under his contract, yet if the servant does labor an unreasonable number of hours, or more than he has contracted to do, he can not recover extra pay unless there is an express promise made by the defendant to pay therefor.

Upon the second branch of the case, to wit, his demand to be paid double the amount of his contractual rate for the two weeks in which he was entitled to a vacation under his contract but did not receive the same, the court said:

> The court was in error in directing the jury that the plaintiff was entitled to recover for the two weeks' employment during which time he might have taken his vacation. It appears from the record that he was paid $20 per week for these two weeks, and there is nothing in the contract of employment by which it can be implied that the plaintiff should receive double compensation for two weeks' time during the year.

The contract between the parties was an express one, covering the entire matter. There was therefore no room for any implied agreement or understanding about wages, and the contract price could not be increased without some further agreement between the parties to that effect. It appears that the plaintiff entered upon such employment under an express contract at $20 per week. He was paid, week by week, the full contract price during the entire year, except the last two weeks, and during the whole time it is conceded that he made no claim or demand upon the defendants for extra compensation until the close of his employment and discharge from the service of the defendants, when for the first time, and after the claim had been put into the hands of his attorney, was any claim made that he intended to hold the defendants liable for extra evenings' work, or double compensation by reason of the agreement for the two weeks' vacation.

It appears that at the close of the testimony defendants' counsel requested the court to charge the jury—

"There is no proof tending to show an express promise by defendants to pay the plaintiff anything for overtime, even if the plaintiff did work for the defendants more hours and more time than he could have been required to labor reasonably by the terms of his contract. A servant can not be required to labor an unreasonable number of hours, but if the servant does labor an unreasonable number of hours, or more than he has contracted to do, * * * he can not recover extra payment unless there is an express promise to pay him therefor."

The court was also asked to instruct the jury—

"If you find that the defendants refused to allow the plaintiff the two weeks' vacation, still the plaintiff

can not recover for this failure, it appearing that he was paid the usual wages for those two weeks."

The court refused to give these instructions to the jury. This was error, as it appears that the plaintiff remained there voluntarily and performed services for which he was paid, and did not call for his vacation, nor make any claim thereto until after his time of employment ended. The defendants, under the facts shown by this record, were entitled to these instructions.

V.

THERE IS NO OBLIGATION ON THE APPELLANTS ARISING EX LEGE OR QUASI EX LEGE, BECAUSE THE TREASURY REGULATIONS OF 1874, IF THEY ARE TO RECEIVE THE CONSTRUCTION PLACED UPON THEM BY THE COURT BELOW, ARE IN CONFLICT WITH LAW, AND NULL AND VOID.

The liability of the appellants in this case, if any exists, must be found in the second theory advanced by the court below, to wit, the argument that these regulations of the Treasury Department, being made pursuant to law, have the force of law, and that the appellants' liability arises *quasi ex lege*.

Assuming that the Secretary of the Treasury has authority to promulgate rules and regulations for the enforcement of customs laws, his authority in this respect is certainly subservient to law, and such regulations must be in conformity with law and not in conflict with any United States statute. If any regulation is made by any executive officer which is contrary either to the spirit or the letter of the law, it must, of course, give way to the law; and before any rights can be predicated upon these regulations

of the Treasury Department it must first be determined whether the regulation itself or the construction which has been placed upon the regulation by the Court of Claims is in conflict with the law of the land. This inquiry was not made by the court below. The court finds that the regulations existed. It then proceeds to place a certain construction upon those regulations, and upon its construction of an existing regulation it assumes that the same was in conformity to law, and upon such construction and assumption built up a liability on the part of the appellants. The court below not only did not hold that these regulations were in conformity with law and were rightfully and properly promulgated by the Secretary of the Treasury within the scope of his authority as head of a Department, but, on the contrary, very gravely doubted the proposition, saying "whether these regulations are authorized by law may well be doubted" (Rec., p. 11), but yet that the court did not feel at liberty to disregard them, because they had been in existence for a great number of years and had met with the tacit approval of the Congress. This latter sentence we shall notice presently. For the present let us proceed with the inquiry whether these regulations were in conformity with the law.

In the first place, these regulations—that is to say, if the regulations mean what the court below has construed them to mean—are hopelessly in conflict with section 2733 of the Revised Statutes. That section provides as follows:

> Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector

> may find it necessary or expedient to employ as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed.

And section 2737 of the Revised Statutes provides that—

> The Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of such officer, a sum not exceeding one dollar per day.

These two statutes are distinct, plain, and mandatory in their requirements, to the effect that no inspector shall be paid more than $3 per day for every day of actual service, and in its authorization of the Secretary of the Treasury to increase that amount at his option, provided such increase does not exceed the sum of $1 per day. These statutes, therefore, absolutely prohibit the payment to an inspector more than $4 per day. The Secretary of the Treasury is prohibited from making any payment in excess of this sum, and therefore any rule or regulation promulgated by the Secretary of the Treasury which results in a payment of more than this sum is plainly and expressly in conflict with these statutes, and therefore null and void. In the next subdivision of the brief we shall submit that the construction placed upon these regulations by the court below is erroneous, and that they were only intended to give the employee a right to cease from work on the night succeeding an all-night watch, and were never designed or intended by the Treasury

Department as an authorization for extra or additional pay. But we are now dealing with the construction placed upon these regulations by the court below, and we say that if the construction of the court below is correct, then the regulations are hopelessly in conflict with the above-cited statutes, and are consequently null and void.

The word "day" as used in a statute universally means a calendar day unless restricted to a less period of time by the statute itself. This fact is admirably expressed in the case of *Benson* v. *Adams* (69 Ind., 353–356), where it is said:

> A day is the unit of time. It commences at 12 o'clock p. m. and ends at 12 o'clock p. m., running from midnight to midnight. In the division of time throughout the world we believe this is regarded as the civil day. When the word "day" is used in a statute or in a contract it means the twenty-four hours and not merely the day as publicly understood from sunrise to sunset or during the time the light of the sun is visible. The fractions of a day in statutes or in legal proceedings or in contracts are not generally considered; but when the rights of parties depend upon precedence of time in the same day or upon a given hour or fraction of it, it may be alleged or proved (citing cases). But unless the meaning of the word is in some way restricted, it will be held to include the twenty-four hours.

And this doctrine has received the sanction and approval of the Court of Claims (*Post* v. *The United States*, 27 C. Cls. R., 244, 256, 257), where it is held that when Congress used the word "day" in a statute like section 2733 of the Revised Statutes it means the ordinary cal-

endar day. Any other doctrine would result in a complete nullification of the intent of Congress and put into the hands of the heads of Departments the power to regulate the salary of employees pretty much as they please. The Congress has by law declared that a night inspector shall not receive a compensation of more than $3 per day for the days of actual service, and has further declared that the Secretary of the Treasury shall not have the power to increase that salary more than $1 per day. If, now, it is to be held that the Secretary of the Treasury has the right to create an arbitrary definition of the word "day," and to divide it into two or four or six periods, manifestly he has the right to raise the salary of an inspector twice, or thrice, or four times above the rate provided by the Congress. It is a very easy thing to do if the definition of the word "day" is to be left exclusively in the head of the Department, and if he has authority to promulgate a regulation dividing a day into any given number of hours then he has only to provide that a day shall be divided into a given number of watches, and by giving his employee an opportunity to serve during all of the watches he has the opportunity to pay such employee for the performance of two, or three, or four, or any other given number of days' work within one day, and thus to increase the expenses of the Government at his pleasure. If it be conceded that the head of a Department, from humane considerations or motives of policy, has the power to accept *less* than a day's work as a discharge of an employee's obligation to perform a *full* day's work, it does not follow that he can

make two days out of one and pay his employee for two *full* days' work when the employee only performs two *half* days' work. If he may be generous to his employee, he must also be just to the Government. In the construction of statutes the intention of the legislature is always the predominating feature of interpretation, and we submit that the intention of the Congress in this case is perfectly plain upon the face of the statute, and that the construction placed upon these regulations by the court below is plainly in violation of that intention.

But not only is the construction placed upon these regulations by the court below in violation of the sections of the Revised Statutes to which we have referred, but equally in plain violation of other provisions of the law. For example, section 1764 of the Revised Statutes provides that—

> No allowance or compensation shall be made for any extra services whatever which any officer or clerk may be required to perform, unless expressly authorized by law.

Section 1765 of the Revised Statutes declares:

> No officer in any branch of the public service or any other person whose salary, pay, or emoluments are fixed by law or regulations shall receive any additional pay, extra allowance, or compensation in any form whatever from the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states it is for such additional pay, extra allowance, or compensation.

The act of June 20, 1874, section 3 (18 Stat. L., 109), provides:

> No civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond such salary or compensation allowed by law.

Thus it will be seen that in all relations between the Government and its servants it has been the constant effort and intention of Congress to prevent in any manner whatsoever the incurring of any expense for salaries, emoluments, fees, labor, or service of any kind whatsoever beyond the amount expressly authorized by Congress. These statutory prohibitions, clear and distinct in themselves, have entered into and become a part of every contract of employment between the Government and every individual who serves it, whether high or low, and to the extent of their terms they are the supreme law of the land, above all departmental regulations, above all contracts, even, in violation of their provisions, binding alike upon the individual employed, upon the person who employs him, and upon the judiciary whenever called upon to interpret the contract of employment. They are not alone prohibitions addressed to the employee, for they are passed as well to prevent executive officers of the Government from imposing additional and unforeseen expenses upon the Treasury by employing any of their subordinates either for extra time or for extra or unusual work. They are part of the settled policy of Congress to regulate and control by specific provisions of

law the contracts of the various Executive Departments, and if the door were once opened it would be impossible for this ever to be accomplished by any appropriation bills specifying the rates of compensation of specific officers. It would be impossible at any given time to arrive at an estimate of the expenses of the Government; it would be impossible to frame a revenue law to meet the expenses of the Government, for nobody would ever be able to say what the expenses of the Government would be for any given period of time. This purpose and intent of the Congress was enforced by this court in the case of *Mullett* v. *The United States* (150 U. S., 566–570), where Mr. Justice Brewer, for the court, after reciting the provisions of the statutes which we have just quoted, says:

> Obviously the purpose of Congress, as disclosed by these sections, was that every officer or regular employee of the Government should be limited in his compensation to such salaries or fees as were by law specifically attached to his office or employment. Extras, which are such a fruitful subject of dispute in private contracts, were to be eliminated from the public service.

And the same doctrines are announced and adhered to in the case of *Hoyt* v. *The United States*, 10 How., 109; *Converse* v. *The United States*, 21 How., 463; *United States* v. *Shoemaker*, 7 Wall., 338; *Stansbury* v. *The United States*, 8 Wall., 33; *Hall* v. *The United States*, 91 U. S., 559; *United States* v. *Brindle*, 110 U. S., 688; *United States* v. *Saunders*, 120 U. S., 126; *Badeau* v. *The United States*, 130 U. S., 439–451; *United States* v. *King*, 147 U. S., 676, in which latter case most of the former cases

were reviewed, and in which it was held that a clerk of a circuit court is not entitled to compensation for services in selecting juries in connection with the jury commissioner, there being no statute expressly authorizing such compensation.

We therefore submit that these regulations of the Treasury Department—if they are to bear the construction which the Court of Claims has put upon them—are hopelessly in conflict with the law, and therefore, even if they could be regarded as an express promise to pay a rate of compensation higher than that provided for in the statutes, such promise would be without authority of law, and nul and void. Such was the express decision of this court in the case of *Stansbury* v. *The United States* (8 Wall., 33). In that case there was a written promise on the part of the Secretary of the Interior to pay a certain clerk in that Department compensation additional to his regular pay as a clerk for services performed by said clerk at the special instance and request of the Secretary of the Interior in and about the preparation of an exhibit by that Department at the London, England, Industrial Exhibition. But the court held that the Secretary of the Interior mistook his power, and that he possessed no authority to make a written promise to pay this employee any sum in addition to his regular pay because of the very act which we have quoted above, to the effect that no officer of the Government shall receive additional compensation for any service unless expressly authorized by law.

The court below was exceedingly doubtful whether these regulations were not in conflict with law, and

gravely doubted whether the Secretary of the Treasury had the authority to pass them. The court said (Rec., p. 11):

> It is these provisions of the regulations which form the groundwork of the court's opinion and which distinguish this case from all other cases; that is to say, from all cases seeking additional or extra pay. Whether these regulations are authorized by law may well be doubted. But having been enforced for a number of years and in operation in every port of the United States, except the port of Baltimore, and having received the tacit, if not express, approval of Congress, this court does not feel at liberty to disregard them and hold that they are not authorized by law.

The court below does not inform us by what process of reasoning it infers that these regulations of an Executive Department ever met with the tacit if not express approval of the Congress. We are not cognizant of any method by which these regulations can be said to have met with any sort of approval from the Congress, unless it be inferred from the fact that Congress has passed general appropriation bills for the payment of the salaries of these inspectors. But certainly it can not be contended that any such regulation as this was known to and approved by Congress from the mere fact that it passed an appropriation bill to pay the salaries of inspectors. When an Executive Department makes up its estimates and sends them to Congress asking for an appropriation, it does not inform the Congress of the particulars for which that appropriation is desired, nor

does it inform the Congress of all of the rules and regulations in force in that Department, and it certainly seems to us that it is stretching the judicial imagination to say that an unlawful regulation of a Department became known to and acquiesced in by the Congress from the mere fact that the Congress passed appropriation bills to pay for it. There is nothing in this case to show that the Congress as a body, or any committee thereof, or any member thereof, ever had any actual or constructive notice that any regulation of an Executive Department had been made which gave to an inspector $6 per day instead of $3, and we doubt not that if the Congress were informed of the fact to-day, they would be surprised, and that if they were charged with an acquiescence in such a rate of pay, they would repudiate it. It seems to us that it is the plain duty of the courts to enforce the law as they find it upon the statute books, and not to imagine or to infer that it is something else because the Congress has passed an appropriation bill for a greater amount. If the regulation of the Executive Department is contrary to the law as it stands upon the statute books, and if the Secretary of the Treasury was without authority of law to promulgate the regulation, then we submit that it is the plain and mandatory duty of the courts to say so, plainly and unmistakably, leaving whatever action the Congress may desire to take in the premises to be taken by that body, unhampered by any advice or charge of constructive acquiescence from the courts.

VI.

THE CONSTRUCTION PLACED UPON THIS REGULATION IS ERRONEOUS.

We submit, however, that the construction placed upon this regulation by the court below is erroneous. The regulation was not designed or intended as a groundwork upon which to build a claim for extra or additional pay. The regulation merely provides that the night watches shall be divided in two, and that if an inspector is required to perform both watches in a given night, that he may be excused from performance of duty on the following night. It also provides that the surveyor of the port shall have power to regulate and determine the hours of these watches. The regulation, therefore, even if it could be regarded as a binding statute, even if it should be looked upon as a law, could not properly be interpreted to mean that a violation of its provision would carry a right of additional pay. The regulation does not provide for anything more than a rest or holiday, or a right to cease from work on a night succeeding that on which the inspector was required to work all night. If he were not given his holiday as provided by this provision, this violation of the law would not carry with it a right to demand pay for such violation. This view of the law has met with the approval of the Court of Claims in numerous instances. Two typical cases are worthy of consideration in this connection. The first is that of *Harrison* v. *The United States* (26 C. Cls. R., 259). In that case the law provided that certain employees of

the Government should have certain leaves of absence without loss of pay. The superior of the claimant required him to work on certain of the days on which he was entitled to be idle, and he sought to receive compensation for those days. The analogy is exceedingly close to the case at bar, where by regulation it was provided that if the appellee worked all of one night he should be entitled to a vacation the following night, and because he was not accorded such vacation he now demands pay for the day n which he was entitled to be idle, but for which he been paid his statutory $3. In neither case did the aw or regulation provide that the claimant should be paid extra, but merely that he need not work. The Court of Claims had no hesitation whatever in deciding that Harrison, by a statute which entitled him to certain days of vacation, was not exempted from the prohibitions of the statutes which we have cited above, and given compensation in case he worked on such vacation days. The suggestion in the opinion of the court below that this case of Harrison is distinguishable from the case at bar because the claimant here received no monthly or yearly stipend but only daily pay, must have been an oversight. Harrison was employed for no term; his pay was per diem. Indeed, on that branch of the comparison the closest identity exists between Harrison and the appellee. But how can it be said that a man whose employment in fact lasts for four years and three months is not employed by the month or year, and is not, as every other employee, removable at the will of his superior? The fact that the compensation

of one is mentioned per day and another per month or per year can make no possible difference. (See *Grissell* v. *Noel*, 19 Ind. App., 258–261, and cases cited.) The Court of Claims had no hesitation in Harrison's Case in transposing $3.20 per day into $998.40 per year, and it is difficult to see how such hesitation to do the same thing was brought about in the case at bar. The court, in Finding I (Rec., p. 5), has found that the appellee was appointed by the collector of the port of Baltimore. But in view of the statutes it would seem that this is error, for we take it that the statutes provide that these officers are to be appointed by the Secretary of the Treasury (see Rev. Stat., secs. 2605, 2606, 2607, 2733, and 2737), and of course if they are appointed by the Secretary of the Treasury, they are not mere employees of the Government but are officers of the Government, this court having repeatedly held that where an employee receives his appointment from the head of a Department he thereby becomes an officer of the United States. (*United States* v. *Germaine*, 99 U. S., 509–510; *United States* v. *Mouat*, 124 U. S., 303–307.)

And the permanent character of these inspectors is further evidenced by the fact that they are required to take an official oath. (Rev. Stat., 2616.) This being true, the statutes which we recited in the early part of this brief are strictly applicable to inspectors of customs, and no distinction can be drawn between the case at bar and the decisions of this court under those statutes already cited.

The next case which is worthy of notice in this connection is that of *Martin* v. *The United States* (94 U. S.,

400), in which this court reverses the holding of the court below. In that case Martin was required to work considerably in excess of eight hours per day, although the law in that case, as the regulation in this case, had fixed eight hours of labor as a day's work. His rate of compensation was $2.50 per day. A suit for compensation for the time worked in excess of eight hours was instituted. There the court said that the statute fixing eight hours as a day's work and prohibiting the employment of laborers and others a longer time, was a direction from a principal to its agent, a direction to the officer of the Government, and while it might clearly prohibit them from requiring more than eight hours' labor and might entitle the employee to refuse to work more than eight hours, it nowhere conferred upon him exemption from the distinct prohibitions of the statute law, to which we have already called the attention of the court. That case is quite as strong as the case at bar, for there the limitation of the day's work was by law certainly of more force than the departmental regulation which is invoked in the case at bar. The distinction which the court below seeks to make between the case at bar and Martin's Case, supra (Rec., p. 12), is, it seems to us, untenable. The court below distinguishes the two cases, because in that case Martin claimed additional compensation for extra time where such additional compensation was prohibited by law, but that in the case at bar the claimant has done two days' work and been paid for only one. The court holds that the regulation of the Department was the law of the case, and although they doubt again

the authority of the Secretary of the Treasury to pass such a regulation, do not care to disturb it because of the presumed acquiescence of the Congress. This begs the question. If the statute in Martin's Case fixed a day at eight hours, and Martin was compelled to work sixteen hours, then is it not true, from the reasoning of the Court of Claims, that Martin worked two days and was only paid for one? The difference is a mere difference in phraseology, and has no inherent force whatever. If the statute in the Martin Case fixed the day at eight hours, and Martin was compelled to work twelve hours, then he performed a half day's labor for which he was not paid. Why can it not be said that Martin performed a day's labor, or a part of a day's labor, or half of a day's labor, for which he was not paid as well as the appellee in the case at bar? To undertake to distinguish the one from the other by calling one case a claim for extra compensation, and the other case the performance of a day's work for which no pay was received, is to make a mere difference in phraseology without any valid distinction. In the case at bar, the claim is as much for extra or additional compensation as was the claim in the Martin Case. The facts are identically the same. If the regulation of the Treasury Department is to be regarded as a law, then it limited a day's labor as effectually and completely as did the eight-hour law in the Martin Case, and while it gave the appellee a right to a vacation on the succeeding night, it did not give him a right to claim pay for that time any more than the eight-hour law gave Martin that right.

To the same effect, see:

Grisell v. *Noel* (9 Ind. App., 251, 258–261).
McCarthy v. *Mayor*, 96 N. Y., 1.
Schurr v. *Savigny*, 85 Mich., 144.
Luske v. *Hotchkiss*, 37 Conn., 219, 220, 221.
Brooks v. *Cotton*, 48 N. H., 50.
Averill v. *United States*, 14 Ct. Cls., 200, 204, 208.
Helphenstine v. *Hartig*, 5 Ind. App., 172.
Bartlett v. *R. R. Co.*, 82 Mich., 658.
Koplitz v. *Powell*, 56 Wis., 671.
R. R. Co. v. *McNight*, 15 Lea (Tenn.), 336.

Besides, if this regulation of the Department is to be regarded as a *law*, then it is *in pari materia* with the various statutes to which we have above referred, and, under a familiar rule of statutory interpretation, must be construed together and made to harmonize with them. (*United States* v. *Healey*, 160 U. S., 136, 147; *Frost* v. *Wenie*, 157 U. S., 46, 58.) It can not be regarded as an implied repeal and must receive such an interpretation as will harmonize it with previous laws. This can only be done by giving it the meaning for which we contend. Any other interpretation brings in into hopeless conflict with the statutes above quoted.

On this branch of the case we therefore submit these alternative propositions: (1) Either that the regulations of the Treasury Department (if they are to receive the construction placed upon them by the court below) are in conflict with and in violation of the statute law of the land, and are therefore null and void regulations upon which no liability can be predicated; or (2) that the said

regulations of the Treasury Department can not be construed as giving to the appellee a right to any extra or additional compensation over the statutory pay of $3 per day, and that the refusal to give him a holiday upon the night succeeding an all-night watch carried with it no liability for the payment of extra compensation for such violation. In either event it follows that the judgment of the Court of Claims must be reversed, with instructions to dismiss the appellee's petition.

VII.

THE COURT BELOW ERRED IN REFUSING TO INSERT THE TREASURY REGULATIONS OF 1884 IN ITS FINDINGS OF FACT OR ELSE IN INSERTING THOSE OF 1874 AND IN FOUNDING A JUDGMENT THEREON.

The third and fifth assignments of error are to the effect that the court below erred in refusing to grant the request of the appellants as set forth in Finding X (Rec., p. 14), wherein the defendants request the court to find that the regulations set forth in Finding VIII continued in force until July 1, 1884, when other regulations were adopted which contained no provision concerning the division of watches into two watches, or providing that if an inspector should be required to work all night that he would be excused from duty on the following night. The court refused to make such finding as prayed for by the appellants for the reason that the court was of opinion that the regulations of an Executive Department founded upon law were not matters of evidence. This is certainly a most peculiar decision

on the part of the court below, for it will be observed that their whole opinion is based upon the regulations of the Executive Department of 1874, and that they are set forth *in extenso* in Findings VIII and IX. And it is upon these regulations that the judgment of the court below was had in favor of the appellee. Certainly if the regulations of 1884 are not matters of evidence then the regulations of 1874 are equally not matters of evidence, and it follows that the judgment of the Court of Claims was rendered upon evidence which was not properly before the court. In either aspect of the case, therefore, the court below has committed reversible error. If the regulations of an Executive Department founded upon a law are to be received as evidence in the court below, then the court erred in refusing to incorporate in its findings the regulations of the Department made in 1884.

If, on the other hand, such regulations are not proper matters of evidence, then the court erred in setting out in Findings VIII and IX the regulations of 1874, and in receiving the same as evidence upon which to base a judgment against the appellants. The decision in Finding X (Rec., p. 14) is hoplessly in conflict with Findings VIII and IX and hopelessly in conflict with the opinion of the court. Two contrary propositions may both be false, but they can not both be true; and it follows with unerring certainty that the court has committed reversible error either in Finding X or in Findings VIII and IX.

We are not advised whether this court will take judicial cognizance of the regulations of an Executive Department printed and promulgated by that Department. If it will not, and the court should be of opinion that the

regulations are properly receivable by the court below as a matter of evidence, then it follows that the judgment of the court below must be reversed, with instructions to the court below to receive from the appellants and incorporate in its findings the Treasury Regulations of 1884, in order that the appellants may present to this court the question whether the regulations of 1884 superseded and annulled all previous regulations. If, on the other hand, this court will take judicial cognizance of the regulations of an Executive Department printed and promulgated by it, we offer the same to the attention of the court *dehors* the record, and proceed to the next assignment of error.

VIII.

THE COURT BELOW ERRED IN HOLDING THAT THE REGULATIONS OF 1874 CONTINUED IN FORCE AT ANY TIME SUBSEQUENT TO MARCH 24, 1883.

In the second assignment of error, we submit that the court below erred in giving any force or effect to the Treasury regulations of 1874 subsequent to March 24, 1883, for on that date a new set of Treasury regulations were promulgated which expressly repealed all prior inconsistent regulations, as witness the following order contained therein:

> TREASURY DEPARTMENT,
> Document, No. 401.
>
> TREASURY DEPARTMENT,
> *Washington, D. C., March 24, 1883.*
>
> The subjoined compilation of laws, Department regulations, and decisions relating to the duties of

inspectors, weighers, gaugers, and measurers of customs is published for their information and guidance.

These officers are expected to make themselves familiar with their several duties as prescribed herein, and in the performance of such duties to conform strictly to the provisions of these regulations. Any neglect or inattention to duty or violation of law or regulation will subject the offender to suspension or removal from office.

All regulations and instructions heretofore promulgated that are inconsistent or in conflict with these regulations are hereby rescinded; and all questions relating to the construction of any law or regulation herein contained, or any question as to the course to pursue in cases not provided for herein, must be submitted to the surveyor, or, if there be no surveyor, to the collector of the port for his decision.

H. F. FRENCH,
Acting Secretary.

Turning now to the provisions concerning night inspectors (p. 127, Arts. 407, 408, 409, which are set out in full in Finding IX, Rec., pp. 6 and 7), we find that the provision concerning the division of the night into two watches *has been entirely omitted*, and that on the blank reports, called "catalogues," on which the inspectors were required to make their reports, the hours of duty are *left blank on both sides*, whereas those previously existing had the hour printed as from — o'clock p. m. to 11.30 o'clock p. m., or from 11.30 o'clock p. m. to — o'clock p. m., thus clearly indicating that the hours of duty should thereafter be left *entirely* with the surveyor

and with the captain and lieutenant of the watch, as provided in articles 407, 408. (Compare the blank reports under the regulations of 1883 with those under the regulations of 1874, as found on p. 7 of Record.)

It is true that the provision authorizing the excuse from duty on a night following an "all-night charge" is retained in the regulations of 1883, but that provision can not be made the basis of a judgment, for the reason that the appellee has already been paid his full statutory or contractual pay (vide *Schurr* v. *Savigny*, 85 Mich., 144, 149, 151, quoted *ante*); nor does the court rest its opinion on such ground, but on the ground that the night was divided into *two* watches, and that when the appellee was required to perform duty on both he was being required to do *twice* as much work as his contract called for, and hence should receive twice as much pay. When, therefore, this provision was repealed and ceased to exist, the entire foundation of the judgment of the court below was taken away. It follows, therefore, that from and after this repeal there ceased to exist any liability on the part of the appellants, even under the doctrines announced by the court below. Hence, the judgment should have been from April 1, 1882 (date of employment), to March 24, 1883 (date of repeal), or 723 nights, less 144 nights barred by the statute of limitations, and less 255 nights on which he received pay but performed no duty (see Rec., p. 10, bottom; and p. 11, top), leaving 324 nights, at $3 per night, amounting to $972. Any judgment in excess of that sum is erroneous.

IX.

THE COURT BELOW ERRED IN GIVING ANY FORCE OR EFFECT TO THE TREASURY REGULATIONS OF 1874, SUBSEQUENT TO JULY 1, 1884.

This point is covered by our fourth assignment of error. Even if it could be held that the regulations of 1874 were not repealed by those of 1883, as contended above, they were certainly repealed on July 1, 1884, when the new regulations were adopted and promulgated, which *entirely omitted* the provisions of 1874, both as regards the division of the night into two watches, and as regards excusing a night inspector from service on a night following an "all-night charge." These regulations are as follows (Art. 1434, p. 562):

> Night inspectors are appointed for the purpose of preventing smuggling. They are required to keep a vigilant watch over the vessels, stores, or merchandise whose custody is committed to them, in order to prevent the landing, between sunset and sunrise, of any merchandise from any vessel, unless the same is done by proper authority and under the supervision of a day inspector, and to protect the bonded stores and merchandise from robbery or the unlawful removal of the merchandise therefrom, or from any wharf or place on which the same may be deposited. (Surveyor's Regs., 127.)
>
> Whenever cargo is being discharged from any vessel at night under the supervision of an inspector, the night inspector assigned to such vessel will not interfere with such landing so long as the inspector is present in charge thereof; but night inspectors are authorized to demand to see, and the inspector is

required to exhibit, the night permit for the working of the vessel. (*Ibid.*)

If merchandise is landed from a vessel when no inspector is present, the night inspector will stop the landing and report the fact next day to the surveyor or other proper officer. (*Ibid.*, 128.)

Coal, ballast, or cargo may be taken into a vessel at night in the absence of the inspector, but the permit to do so must be exhibited to the night inspector. (*Ibid.*)

Night inspectors are required to stop any person or persons who may leave the vessel, store, or warehouse in their custody; and if they have reasonable cause to suspect that such person or persons are attempting to smuggle any merchandise they will examine such person or persons, and any package of any kind in his or their possession. (*Ibid.*)

Searches of suspected persons should, if possible, be made in the presence of another officer or a citizen. (*Ibid.*)

Night inspectors are directed to question any person who may attempt to go on board of the vessel to which they are assigned in the night, and to satisfy themselves that such person has the right or may properly be allowed to go on board. (*Ibid.*)

They are required to keep a strict watch upon any small boat which may come to or near any wharf or any vessel at which they are assigned, and to take all necessary precautions to prevent smuggling by such boats. (*Ibid.*)

Night inspectors have the right and are required to arrest any person or persons in the act of smuggling foreign merchandise, and to call for the assistance of the police or of citizens to aid them in so doing, and to seize, take possession of, and secure

any merchandise which has been smuggled or landed illegally from any vessel during the night. (*Ibid.*)

At ports where captains and lieutenants of night inspectors are appointed, they shall assign the force to duty and make daily reports of such assignments, together with any negligence, absence, or misconduct.

They shall see that the night inspectors perform the duties assigned to them, that all seizures and arrests are promptly reported, and that the orders of the surveyor are obeyed.

Nor are we left entirely to implication or the entire absence of the previous provisions to show that they were superseded, annulled, and repealed by these latter regulations. This *intention* is clearly expressed in Department letter promulgating the regulations of 1884 and prefixed to the printed volume. It is as follows:

TREASURY DEPARTMENT,
Document No. 552.
Secretary's Office.

TREASURY DEPARTMENT,
Washington, D. C., July 1, 1884.

This volume of revised regulations is promulgated for the information and government of public officers.

The instructions for the revision were issued on the 10th of January, 1884. Among those instructions were the following:

"The order and arrangement of the volume of 1874 will be preserved, so far as practicable, for the convenience of those familiar with it.

"The language of each article will be retained *verbatim*, except where a change is made necessary by some statute, decision, or circular, to the end that

settled constructions of language may not be disturbed. *Substitutes for existing regulations will take their place*, but new regulations not substitutes for old ones will be placed at the end of the division or subject.

"Provisions of the Revised Statutes, or later statutes in force on which a regulation is based, will be cited—the Revised Statutes by sections, later statutes by year, volume, page, and section. Decisions and circulars will also be cited—decisions, S., with number; circulars by date and number."

The work has been stereotyped and printed as fast as the several parts could be prepared in their order, and attention is therefore called to any instructions issued since January 10, 1884, changing the regulations.

Collectors at the principal ports are instructed to set apart one copy of this work, to be known as the "standard copy," which will be corrected by the addition thereto of all orders and instructions which affect these regulations, or by references thereto. Such "standard copy" will be turned over by each retiring officer to his successor as a part of the public property in his charge.

CHAS. J. FOLGER, *Secretary.*

It will be observed that the new regulation concerning night inspectors "takes the place" of the former ones, and hence by the terms of the foregoing letter is meant to be a "substitute for existing regulations," since it "takes its place" and is not "placed at the end of the division or subject."

A regulation of a Department can only be considered as having binding force as long as it expressly exists. It

is entirely competent for the head of a Department to discontinue that regulation in any way that he sees fit, and we submit that to promulgate subsequent regulations is made to that provision of the old regulations to the effect that night watches should be divided into two watches of as nearly equal length as possible, and that where an inspector was required to perform an all-night watch he would be excused from duty on the succeeding night.

to repeal the former regulations inconsistent therewith

We therefore submit that the judgment should not have been for nine hundred and fifty-four nights, or in the sum of $2,862, but should have been only for the nights between August 24, 1882, and July 1, 1884, when the aforesaid provision ceased to be in effect; or, in other words, judgment should have been for six hundred and seventy-two nights, less two hundred and fifty-five nights, when claimant performed no duty but received pay, making a total of four hundred and seventeen nights, at $3 per night, amounting to $1,251. (See Finding X, Rec., p. 14; see also Record, p. 10, bottom, and p. 11, top.)

Upon the whole case we therefore submit, (1) that the judgment of the Court of Claims should be reversed, with instructions to dismiss appellee's petition; or (2) that the judgment of the Court of Claims should be reversed for error committed in the tenth finding of fact, and that the same should be returned to the Court of Claims with instructions to embrace in the findings of fact the regulations of the Treasury Department made in 1884, as prayed for by the appellants in Finding X; or (3) that the court should reduce the judgment to $972,

as set out in the second assignment of error; or (4) that the court should take judicial cognizance of said regulations of 1884, and reduce the judgment of the Court of Claims to the sum of $1,251, as above set forth.

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